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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 511

AMERICAN TRUCKING ASSOCIATIONS, INC.,
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
THE PENNSYLVANIA RAILROAD COMPANY,

Appellants,

v.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
SOUTH PATERSON TRUCKING COMPANY, INC., AND
PRIVATE CARRIER CONFERENCE, INC.,

Appellees.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

MOTION TO AFFIRM

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INDEX

	Page
STATEMENT	1
ARGUMENT	3
CONCLUSION	7

CITATIONS

Cases:

Coe v. Errol, 116 U.S. 517 (1886)	5
Diamond Match Co. v. Ontonagon, 188 U.S. 82 (1903)	5
Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926)	5
Motor Transportation of Property Within a Single State, 94 M.C.C. 541 (1964)	2
Pennsylvania R.R. Co. v. Public Utilities Commission, 298 U.S. 170 (1936)	2, 3, 5, 6
Southern Pacific Terminal v. Interstate Commerce Commission, 219 U.S. 498 (1911)	5

Statutes:

28 U.S.C.	
Section 2284	1
Section 2325	1
Interstate Commerce Act:	
49 U.S.C. preceding Sections 1, 301, 901, and 1001	4

Miscellaneous:

Revised Rules of the Supreme Court, Rule 16	1

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In accordance with Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees South Paterson Trucking Company, Inc. and Private Carrier Conference, Inc. move that the judgment of the district court be affirmed.

STATEMENT

In accordance with 28 U.S.C. 2284 and 2235, this is a direct appeal from a judgment of a three-judge district court which dismissed the Pennsylvania Railroad Company complaint seeking to set aside orders of the Interstate Commerce Commission in *Motor Transportation*

of Property Within a Single State, 94 M.C.C. 541 (1964). The orders sustained by the district court declared that for hire transportation by motor truck within the confines of a single state immediately followed or preceded by private motor carriage across a state line was not subject to the economic regulation of the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

On September 28, 1964 the Pennsylvania Railroad Company filed a complaint with the district court seeking to overturn the report and orders of the Interstate Commerce Commission. Both the Private Carrier Conference, Inc. and the South Paterson Trucking Company, Inc., having participated as parties before the Interstate Commerce Commission, intervened as defendants to support the decision of the Interstate Commerce Commission. Motions to intervene were filed with the district court on October 15, 1964 and such motions were granted *nunc pro tunc* by the district court on June 30, 1965. The district court handed down its decision on April 23, 1965 and upheld the report and orders of the Interstate Commerce Commission (J.S.1a).[1] Formal judgment was entered on June 11, 1965 dismissing the complaint of the Pennsylvania Railroad Company and the intervening plaintiffs, American Trucking Associations, Inc. and the National Motor Freight Traffic Association.

Although an interpretation of Part II of the Interstate Commerce Act was involved, the district court used the rationale of *Pennsylvania R.R. Co. v. Public Utilities Commission*, 298 U.S. 170 (1936), 56 S.Ct. 687, as determinative of the outcome of the case before it. The key language in the district court decision is the following:

> ". . . Nevertheless we feel, as did the Commission below, that the logic of *Pennsylvania R.R. Co., supra*, is equally applicable to Part

[1] For convenience we refer to Jurisdictional Statement filed by The Pennsylvania Railroad Company.

II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below." (J.S. 3a)

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

1. At the present time under Part I of Interstate Commerce Act, for hire rail transportation within a single state immediately preceded or immediately followed by private carriage across a state line is not subject to the economic jurisdiction of the Interstate Commerce Commission. *Pennsylvania R.R. Co. v. Public Utilities Commission, supra.* The district court has held, in support of the Interstate Commerce Commission, that for hire motor truck transportation within a single state immediately preceded or followed by private motor carriage across a state line is also not subject to the economic regulation of the Interstate Commerce Commission under Part II of the Interstate Commerce Act. Appellants argue that Part I and Part II are significantly different and, accordingly, that for hire motor truck transportation within a single state immediately preceded or followed by private motor carriage across a state line is subject to the economic jurisdiction of the Interstate Commerce Commission.[2]

The effectuation of the National Transportation Policy demands that intrastate rates be applied in this situation. Congress has charged the Interstate Commerce Commis-

[2] In essence, therefore, this latter view is to the net effect that private motor carriers who wish to utilize for hire rail facilities within a state should pay intrastate rates and that private motor carriers who wish to utilize for hire motor truck facilities within a state should pay interstate rates when in both cases such transportation immediately precedes or is followed by private motor carriage across a state line.

sion with the duty to provide for and to preserve a national transportation system adequate to meet the needs of the commerce of the United States:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economic, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences, or advantages, or unfair or destructive competitive practices; . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U.S.C. preceding Sections 1, 301, 901, and 1001.

It is quite clear, then, that the Congress intended that the Interstate Commerce Act be considered as a whole and that its individual parts not be considered in a vacuum. And yet this is just what the appellants are asking this Court to do, namely, consider Part II as not an integrated part of the overall Interstate Commerce Act.[3] The appellants would have this Court declare interstate rates applicable to single state for hire motor transportation on the one hand and on the other hand intrastate rates applicable to single state for hire rail transportation, when either is immediately preceded or immediately followed by interstate private motor carriage. This position is completely contrary to the expressed intention of the Congress as reflected in the statement of National Transportation Policy.

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[3] Generally speaking, intrastate rates are lower as far as motor truck for hire facilities are concerned than are interstate rates of motor truck for hire carriers. The economic basis for the dispute is, therefore, quite clear.

2. The underlying principles of the 1936 *Pennsylvania Railway* case, *supra*, are applicable to Part II. Not all interstate commerce is transportation and transportation begins when freight is placed in the care of a for hire carrier for movement. Thus spoke this Court in the *Pennsylvania* case. Although this latter case arose under an interpretation of the applicability of Part I of the Act, this Court in making such a pronouncement looked in part to a case which was decided by it prior to the enactment of the Interstate Commerce Act on February 4, 1887, and to pre-1936 cases, such cases having no connection, with one exception, to an interpretation of Part I of the Act.[4] In the *Pennsylvania* case, this Court simply found no inconsistency between earlier cases and the commerce versus transportation propositions announced therein and the provisions of Part I. Accordingly, this Court continued the life of these legal propositions. The district court applied the same reasoning, and found nothing in Part II inconsistent with the propositions.

This Court declared in the *Pennsylvania* case that private motor carriage across a state line followed by for hire rail carriage would be completely consistent with these propositions. This was done at a time when this Court must be presumed to have known that the Interstate Commerce Commission, pursuant to Part II of the Act, had authority to regulate the safety aspects of such carriage by private trucks across a state line. This case was argued and decided in April, 1936, whereas the power of the Interstate Commerce Commission over the safety aspects of interstate private carriage went into effect on October 1, 1935. There is no indication that with such knowledge this Court intended when freight was trans-

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[4] *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 475 (1926); *Coe v. Errol*, 116 U.S. 517, 528 (1886); *Diamond Match Co. v. Ontonagon*, 188 U.S. 82, 95 (1903); in *Southern Pacific Terminal v. Interstate Commerce Commission*, 219 U.S. 498, 527 (1911), the same proposition was sustained although this case did involve the Interstate Commerce Act. Under Part II, only "transportation" is economically regulable by the Commission and then only if it is interstate, and not otherwise exempt.

ferred to for hire rail carriers to make any such distinction concerning the applicability of intrastate rates by virtue of the fact that private trucks were so regulated. As a matter of fact, the contrary is the case.[5]

Now it is stated that since private motor carriage across a state line is regulated by the Interstate Commerce Commission for safety purposes, transportation begins when the private carrier commences a movement and if thereafter such freight is given to the custody of a single state for hire motor carrier, interstate rates are applicable. This, of course, is at variance with the *Pennsylvania* case and its underlying propositions. We submit that the substitution of motor for hire within a given state in lieu of rail for hire carriage is not a distinguishing point of decisional significance. So also concluded the district court.

3. Appellants claim there will be a regulatory vacuum unless the decision of the district court is reversed. Such is not the case. If it were, the Interstate Commerce Commission would have found it necessary to secure enabling legislation in this area. The state regulatory bodies have for decades regulated the rates of for hire car-

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[5] In the *Pennsylvania* case, this Court pointed out that the situation before it would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. This Court went on to stress on pages 176 and 177 that even though this were done systematically and not casually or in sporatic instances, the ensuing for hire transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. In using this example, the Supreme Court was referring to private carriage by motor vehicles. Lest there be any doubt of this, the language immediately preceding the recital of this example (which is consistent with the context of the whole case being related to private carriage by barges, railroad, etc.) specified "carriage by owners."

riers operating within their borders even though they were transporting goods which have or would immediately cross a state line by private carriage. This has been done just as the state regulatory agencies have regulated the rates of the railroads who operate within the borders of a single state and which carry goods received from or deliverable to a private carrier crossing a state line.

CONCLUSION

Since this Court has already considered this issue relative to Part I of the Interstate Commerce Act and the district court, finding no significant statutory differences between Parts I and II of the Act, applied the logic enunciated by this Court, no substantial question remains.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I. William H. Borghesani, Jr., attorney for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of September, 1965, in compliance with Rule 33 of the Revised Rules of Practice, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof, first-class mail, postage prepaid, as follows

1. On the appellee, United States of America, copies to Hon. Nicholas DeB. Katzenback, Attorney General of the United States; Hon. Thurgood Marshall, the Solicitor General, Department of Justice, Washington 25, D. C.; Drew J.T. O'Keefe, Esq., United States Attorney for the Eastern District of Pennsylvania, 4042 U.S. Courthouse, Philadelphia, Pa. 19107.

2. On the appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and I.K. Hay, Esq., Deputy General Counsel, at the offices of the Commission, Washington, D.C. 20423.

3. On the appellant, American Trucking Associations, Inc., copies to Peter Beardsley, Esq., Richard R. Sigmon, Esq. and Harry J. Jordan, Esq., 1616 P Street, N. W., Washington, D.C. 20036; and to Ralph C. Busser, Jr., Esq., 1710 Locust Street, Philadelphia, Pa. 19103.

4. On the appellant Penn. Railroad Co., copies to Carl Helmetag, Esq., Asst. General Counsel and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia, Pennsylvania.

5. On the National Industrial Traffic League, copies to John F. Donelan, Esq., and William L. Slover, Esq., 888 17th Street, N. W., Washington, D. C.

6. On the appellant National Motor Freight Traffic Association, Inc., copies to Bryce Rea, Jr., Esq., 917 Munsey Building, Washington, D.C. 20004.

7. On the Pennsylvania Public Utility Commission, copies to Joseph C. Brune, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania.

William H. Borghesani, Jr.